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First report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

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I. The distinction between "criminal" and "delictual" responsibility

Introduction

43. The single most controversial element in the draft articles on State responsibility is the distinction between international crimes and international delicts. That distinction was first accepted in 1976, when article 19 was provisionally adopted. But its substantive consequences were not finally formulated by the Commission until 1996, and then only after a difficult and fraught debate.[27] There is a marked contrast between the gravity of an international crime of a State, as expressed in article 19, on the one hand, and the rather limited consequences drawn from such a crime in articles 51 to 53, on the other. There is a further contrast between the strong procedural guarantee associated with countermeasures under article 48 and part three, and the complete absence of procedural guarantees associated with international crimes.

44. When article 19 was first adopted, many Governments preferred to reserve their written comments until the definition of an international crime had been completed by the elaboration of specific consequences and procedures. In the debates in the Sixth Committee a majority of States which expressed views in the period 1976-1980 supported the distinction between crime and delict; an even larger majority favoured some distinction being drawn between more and less serious wrongful acts.[28]

45. Following the adoption of parts two and three, all the Governments which have so far commented have dealt with the issue of international crimes. Their comments reveal a wide range of views and include many criticisms and suggestions: they are summarized below. A similarly wide range of views is contained in the extensive literature.[29] It is time to take stock.

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[27] As a result of the decision not to reopen issues raised by part one of the draft articles, the Commission during this period did not reconsider article 19 itself. See the footnote to article 40, cited in para. 51 below. The principal Commission reports dealing with international crimes are: Ago, fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1-2, pp. 24-54; Riphagen, third report, *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1-2, pp. 48-50; fourth report, *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/366 and Add.1, pp. 10-24; Arangio-Ruiz, seventh report, A/CN.4/469 and Add.2 (1995), eighth report, A/CN.4/476 and Corr.1 (1996).

[28] A careful analysis of the views of the 80 Governments which expressed themselves at that time is contained in M. Spinedi, "International Crimes of State: The Legislative History", in J.H.H. Weiler, A. Cassese and M. Spinedi (eds.), *International Crimes of State* (de Gruyter, Berlin, 1989), pp.45-79.

[29] See the items contained in the bibliography attached to the present report. Among these, Weiler, Cassese and Spinedi (eds.), *International Crimes of State* (1989) is of particular importance. The most persuasive defence of article 19 is A. Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international" in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations, New York, 1997), p. 287. Contrary views expressed by present or past members of the Commission include: R. Rosentock, "An International Criminal Responsibility of States?", ibid., p. 265; D. W. Bowett, "Crimes of State and the 1996 Report of the International Law Commission on State Responsibility" *EJIL, 1998*, p. 163; I. Brownlie, *State Responsibility, System of the Law of Nations, Part I* (Clarendon Press, Oxford, 1983), pp. 32-33; B. Simma, "From Bilateralism to Community Interest in International Law" *Receuil des cours ...*, vol. 250 (1994), pp. 301-321.

A. The treatment of State crimes in the draft articles

46. Article 19, paragraph 1 provides that:

> "1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached."

This is a statement of the obvious. It has sometimes been argued that an international obligation has not been, or could not have been, assumed with respect to a particular subject (e.g., because it is domestic or internal to the State).[30] There appears, however, to be no case where a State has claimed to be exempt from responsibility with respect to an acknowledged international obligation, merely because of the subject matter of that obligation. Nor is there any reported case where an international tribunal has upheld such an argument. No contrary view or authority is cited in the commentary. Article 19, paragraph 1, does no more than express what is clearly implied by articles 1 and 3, and can safely be left to be clarified in the commentaries to those articles.

47. Article 19, paragraph 4 proclaims a distinction between international crimes and international delicts:

> "Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."

The category of "delict" is thus defined in purely negative terms, in contradistinction to the definition of "international crimes".

48. That definition is contained in article 19, paragraph 2, which defines as "an international crime":

> "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".

The circularity of this definition has often been noted. On the other hand, it is no more circular than the definition of peremptory norms of general international law (*jus cogens*) contained in article 53 of the Vienna Convention on the Law of Treaties of 1969, a definition now widely accepted. But it is possible to define the category of "crimes" in other ways. This might be done, for example, by reference to their distinctive procedural incidents. "Crimes" might be distinguished from "delicts" by reference to the existence of some specific system for investigation and enforcement. Or the distinction might be made by reference to the substantive consequences. Thus "delicts" might be defined as breaches of obligation for which only compensation or restitution is available, as distinct from fines or other sanctions. Article 19, paragraph 2, adopts neither course. And as will be seen, the draft articles nowhere specify any distinctive and exclusive consequence of an "international crime". Nor do they lay down any authoritative procedure for determining that a crime has been committed.

49. Conscious of the difficulties of applying the bare definition contained in article 19, paragraph 2, the Commission sought to clarify the position in paragraph 3. This provides:

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[30] The Permanent Court in an early case pointed out that international obligations could in principle be assumed by States on any subject: see *Nationality Decrees in Tunis and Morocco* (1923) *P.C.I.J. Series B No. 4*, pp. 23-27. The development of international law-making bears out this remark. Cf. *Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports 1986*, p. 131.

"3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

Even supporters of the principle underlying article 19 are strongly critical of paragraph 3, and for good reason.[31] First, it is an illusory definition. A crime merely "may result" from one of the enumerated acts. Secondly, it is wholly lacking in specificity. A crime "may" result. but subject to paragraph 2 and to unspecified "rules of international law in force". The problem is not that paragraph 3 only provides an inclusive list; it could hardly do otherwise. It is rather that it provides no assurance that even the breaches enumerated would constitute crimes, if proven. Whether they "may" do so depends, *inter alia*, on "the rules of international law in force". No doubt it was not the function of the draft articles, including article 19, paragraph 3, to restate primary rules, but that is no reason to give the *appearance* of doing so. Thirdly, the various subparagraphs are disparate both in their content and in their relation to existing international law.[32] Having regard to its merely illustrative role and its lack of independent normative content, paragraph 3 should be substituted by a more detailed commentary, if the distinction between crimes and delicts is retained in the draft articles.[33]

50. An analysis of paragraph 3 leads directly back to paragraph 2, but the illustrations offered in paragraph 3 raise a further question. The emphasis in paragraph 2 is on *norms* which are essential for the protection of fundamental interests of the international community, such that the community regards a breach of those norms as constituting a

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[31] See, e.g., Pellet, op. cit. (footnote 29), pp. 298-301.

[32] This can be illustrated, for example, by reference to subpara. (d). Its opening words evidently do not refer to a single "obligation ... for the safeguarding and preservation of the human environment", international law contains a range of environmental norms and cannot be expressed in terms of a single rule. Depending on the circumstances, a large number of rules can be described as safeguarding and preserving the "human environment", a term which also raises issues about its relationship to "the natural environment" or to the environment as a whole. The second clause ("such as") raises further difficulties: (I) the phrase "such as" provides yet a second level of inclusiveness; (ii) the word "those" cannot grammatically refer back to the singular "obligation"; and (iii) general international law does not contain a norm prohibiting "massive" pollution: whether the threshold for the prohibition may be set (and it may be different in different contexts), it is clearly less stringent than "massive" pollution.

[33] It should be noted that the version of article 19 originally proposed by Special Rapporteur Ago was very different: see his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1-2, p. 54. It was both much broader in its ambit (for example, any breach of Article 2, paragraph 4 of the Charter of the United Nations was designated an "international crime") and more definite in its content. The tentative and qualifying language of article 19, paragraph 3 was added in the Drafting Committee. The original draft is better read as an attempt to express the notion of obligations *erga omnes*, and indeed the term "international crime" was placed in inverted commas. At that stage, of course, no attempt had been made to define the range of States affected or injured by a breach of obligation.

"crime". By contrast, paragraph 3 focuses not on the importance of the norms but on the seriousness of their breach: it is only "serious" breaches that are crimes, in some cases further qualified by such phrases as "on a widespread scale" or "massive". But international law does not contain a norm which prohibits, for example, "widespread" cases of genocide: it simply prohibits genocide. In other words, paragraph 3 adds an additional element of seriousness of breach, independently of the legal definition of the crime itself. It is not unusual for criminal law norms to incorporate a definitional element corresponding to the scale or seriousness of the conduct to be prohibited; but paragraph 3 appears to add yet a further unspecified element of seriousness. Taken together the two paragraphs can be read as saying that if (for example) a case of aggression, or of genocide, is so serious that the international community as a whole stigmatizes that act as criminal, then it is to be accounted a crime. To which it must be objected that this is not a definition of international crimes at all.[34]

51. The consequences of international crimes are dealt with in part two:

- Under article 40, paragraph 3, all other States in the world are defined as "injured States" with respect to an international crime. The corollary is that all States may seek reparation under articles 42 to 46, and may take countermeasures under articles 47 and 48. This is perhaps the single most significant consequence of an international crime. However, it is not a *distinctive* consequence of such crimes, since many or all States may be "injured" by a delict pursuant to articles 40, paragraph 2 (e) or (f), for example by a breach of an obligation under a multilateral treaty or under general international law for the protection of human rights and fundamental freedoms. Article 40, paragraph 2 (e) (iii), does not require that such a breach should have been "serious", or that the obligation should have been "of essential importance";
- Under article 52, certain rather extreme limitations upon the obtaining of restitution or satisfaction do not apply in case of crimes. Thus in the case of crimes an injured State is entitled to insist on restitution even if this seriously and fruitlessly jeopardizes the political independence or economic stability of the "criminal" State;
- Under article 53, there is a limited obligation of solidarity in relation to crimes. For example, States are under an obligation "not to recognize as lawful the situation created" by a crime (article 53 (a)). This may suggest, *a contrario*, that States are entitled to recognize as lawful the situation created by a delict, no matter how serious that delict may be.

By contrast, the draft articles do not provide for "punitive" damages for crimes, let alone fines or other sanctions. Nor do they lay down any special procedure for determining authoritatively whether a crime has been committed, or what consequences should follow: this is left for each individual State to determine *qua* "injured State". Detailed proposals for such a procedure were rejected by the Commission in 1995 and again in 1996;[35] attempts to draft lesser alternative procedures were not accepted.[36] Overall it can be said that the specific consequences attached to international crimes in parts two and three are rather

[34] Cf. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, P.C.I.J. Series A/B, No. 65 (1935), pp. 52-53.

[35] For the proposals see Arangio Ruiz, seventh report, A/CN.4/469 and Add.2, paras. 70-119, 140-146, eighth report, A/CN.4/476 and Corr.1. For a summary of the debate, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), paras. 304-339; ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.B, para. 61, and chap. III.D.2, commentary to article 51.

[36] These proposals are briefly described in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.D.2, paras. (7)-(14) of the commentary to article 51.

minimal, at least if the notion of "crimes" reflected in article 19 is to be taken at face value. Indeed this can be implied from a footnote added to article 40, which reads:

> "The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term."

This possibility will be discussed in a subsequent section of the present report.

B. Comments of Governments on State crimes

52. A number of Governments which have so far commented in the current round on the draft articles have been critical of the inclusion of State crimes in the draft articles.

- The *United States of America* strongly opposes the provisions dealing with State crimes for which, in its opinion, "there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole". It bases this view on the "institutional redundancy" of the notion of international crimes, given the existing role of the Security Council and its subordinate organs and the proposed international criminal court; the "abstract and vague language" of article 19, paragraph 2; the tendency of article 19 to diminish "the import of and the attention paid to other violations of State responsibility"; its contradiction with the "principle of individual responsibility", and the confusion it tends to produce as between the notion of States' "interest" in compliance with the law generally and their "standing" to protest a particular violation.[37]
- *France* complains that article 19 "gives the unquestionably false impression that the aim is to 'criminalize' public international law", contrary to existing international law which emphasizes reparation and compensation. In the view of the French Government, "State responsibility is neither criminal nor civil" but is *sui generis*. While some wrongful acts are more serious than others, the dichotomy between "crimes" and "delicts" is "vague and ineffective", and "breaks with the tradition of the uniformity of the law of international responsibility". France stresses that "no legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them. It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty". By contrast, Security Council measures under Chapter VII of the Charter of the United Nations are not intended to be "punitive"; where they are "coercive" it is because the restoration of international peace and security requires them to be effective.[38]
- *Germany* expresses "considerable scepticism regarding the usefulness of the concept" of international crimes, which are in its view "not sustained by international practice", would tend to weaken the "principle of individual criminal responsibility" and is inconsistent with the principle of the equality of States. In its view, "universally condemned acts can now be expected to find their adequate legal and political response by the community of States" acting through existing institutional means, in particular Chapter VII of the Charter of the United Nations. By contrast with

[37] A/CN.4/488, comments by the United States under article 19 and article 40, para. 3.

[38] Ibid., comments by France under article 19.

international crimes, "the concepts of obligations *erga omnes* and, even stronger, *jus cogens* have a solid basis in international law"; the Commission is encouraged to develop the implications of these ideas in the field of State responsibility.[39]

- The *United Kingdom of Great Britain and Northern Ireland* sees "no basis in customary international law for the concept of international crimes" nor any "clear need for it". Instead it points to what it regards as "a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not". Moreover the actual consequences attached to international crimes appear to be "of little practical significance and, to the extent that they do have significance, to be unworkable". At a technical level, article 19 is criticized as giving "no coherent account ... of the manner in which the 'international community as a whole' may 'recognize'" international crimes, and of confusing the question of the seriousness of a norm (article 19, paragraph 2) and the gravity of its breach (article 19, paragraph 3).[40]
- *Austria* proposes the deletion of articles 19 and 51 to 53. In its view, "inter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behaviour". Action should be taken within the framework of Chapter VII of the Charter, or against individuals (including State officials) through the development of organs for the enforcement of international criminal law: these mechanisms "may provide a more effective tool against grave violations of basic norms of international law such as human rights and humanitarian standards than the criminalization of State behaviour as such". On the other hand, the Commission should "concentrate on the regulation of the legal consequences of violations of international law of a particularly grave nature".[41]
- *Ireland* doubts that existing international law recognizes the criminal responsibility of States, as distinct from State responsibility for the criminal acts of individuals. It notes that the well-known dictum of the International Court in the *Barcelona Traction* case supports the notion of obligations *erga omnes*,[42] but suggests that there is a "quantum leap" from that notion to the criminal responsibility of States. Nor does it support the concept of international crimes as a matter of progressive development. To penalize the State is neither feasible nor just, since in many cases it is the people of the State itself who are the principal victims of the crime.[43]
- Switzerland likewise doubts the existence or utility of the distinction between crimes and delicts: indeed it describes the distinction as "an attempt to conceal the ineffectiveness of the conventional rules on State responsibility behind an ideological mask".[44]

53. However, these views are by no means universally shared. The *Czech Republic*, for example, expresses the view that a distinction between more and less serious wrongful acts is "to be found in positive law and in State practice, although ... no doubt in a relatively fragmentary, unsystematic or indirect form". In that regard it refers to the notion of obligations *erga omnes*, the activity of the Security Council under Chapter VII of the Charter

[39] Ibid., comments by Germany under part two, chap. IV.

[40] Ibid., comments by the United Kingdom under article 19.

[41] Ibid., comments by Austria under article 19.

[42] *I.C.J. Reports 1970*, p. 33.

[43] A/CN.4/488, comments by Ireland under article 19.

[44] Ibid., comments by Switzerland under article 19.

and the concept of *jus cogens*. Despite supporting the distinction between crimes and delicts, it affirms that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international", noting in addition that in some legal systems the term "delict" has an exclusively penal connotation. It therefore proposes adopting more neutral terms, or even making the distinction by other means, e.g. by differentiating more clearly the consequences of wrongful acts depending on whether they affect particular States or the interests of the international community as a whole. "As a result, the terms used in the articles would be neutral but would leave the necessary room for widely acceptable terms to be developed subsequently in the sphere of State practice and doctrine."On the other hand, it points out the difficulties in attaching specific consequences to international crimes of State, which consequences are intimately linked to questions relating to the relevant primary rules.[45]

54. *Mongolia* supports the distinction between crimes and delicts, on condition that the determination of State criminal liability cannot be left to the decision of one State but should be "attributed to the competence of international judicial bodies",[46] which is not the case under the present draft articles.

55. *Uzbekistan* proposes a new version of article 19, paragraph 2, focusing on "internationally wrongful acts of exceptional gravity which pose a threat to international peace and security and also infringe upon other vital foundations of peace and of the free development of States and peoples".[47]

56. *Denmark*, on behalf of the *Nordic countries*, notes that they continue to support the "most spectacular feature of part one", the distinction between international delicts and international crimes. The "systemic" responsibility of States for crimes such as aggression and genocide ought, in their view, to be recognized "in one forum or another be it through punitive damages or measures affecting the dignity of the State". On the other hand, some other less "sensitive" terminology, such as "violations" or "serious violations", might be considered, provided it carries more severe consequences, and that the distinction between the two categories is clear.[48]

57. *Mexico* observes that "there is inadequate differentiation of the terms 'crime' and 'delict' in the draft articles". This appears to be directed as much to the consequences of international crimes, spelt out in part two, as to the definitional issues dealt with in article 19.[49]

58. *Argentina* affirms that "the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State". On the other hand, now that "the international legal order tends to draw a clear distinction between the international responsibility of the State and the international criminal responsibility of individuals, it does not seem advisable to apply to the former a terminology appropriate to the latter". It also calls upon the Commission to "elaborate as precisely as possible the different treatment and the different consequences attaching to different violations".[50]

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[45] Ibid., comments by the Czech Republic under article 19.

[46] Ibid., comments by Mongolia under article 19.

[47] Ibid., comments by Uzbekistan under article 19.

[48] Ibid., comments by the Nordic countries under article 19.

[49] Ibid., comments by Mexico under article 19.

[50] A/CN.4/488/Add.1, comments by Argentina under article 19.

59. *Italy* likewise supports maintaining a distinction between the most serious internationally wrongful acts, of interest to the international community as a whole, and other wrongful acts, but it calls for further development both of the substantive consequences and the procedural incidents of the distinction, within the framework of parts two and three of the draft articles. In its view, once the existence of such a category is accepted, then the consequences of the distinction must be dealt with in the draft articles: " it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed". On the other hand, this special regime of State responsibility has nothing in common with penal sanctions such as those imposed under national criminal laws, and the use of some other term than "international crimes" could perhaps be envisaged.[51]

60. These comments have been summarized in some detail, because they give a full and insightful account of the current debate over international crimes of State. This is true even if the comments so far received cannot necessarily be regarded as representative of the views of the international community as a whole. Clearly, no simple conclusion can be drawn from them. Nonetheless there is a significant degree of support for a number of propositions. They may be summarized as follows:

(i) Article 19 is generally seen as an exercise not of codification but of development. Different views are expressed as to whether the development is "progressive" but few Governments believe that the concept of international crimes has a strong basis in existing law and practice;

(ii) The definition of "international crimes" in articles 19, paragraphs 2 and 3, needs further clarification;

(iii) The consequences drawn from the distinction create difficulties to the extent that they allow for reactions by individual States acting without regard to the position of the international community as a whole;

(iv) There is little or no disagreement with the proposition that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international".[52] As a corollary, even those Governments which support the retention of article 19 in some form do not support a developed regime of criminal responsibility of States, that is to say, a genuine "penalizing" of the most serious wrongful acts;

(v) Consistent with this view, it is quite widely felt that the terminology of "crimes" of State is potentially misleading. Many comments accept that a distinction should be drawn, along the lines of the *Barcelona Traction* dictum, between the most serious wrongful acts, of interest to the international community as a whole, and wrongful acts which are of concern only to the directly affected States. But this distinction need not and perhaps should not be expressed in the language of "crime" and "delict". Instead, some different terminology should be explored; alternatively the different characteristics of wrongful acts could be more systematically articulated in part two of the draft articles, within the framework of a single generic conception of State responsibility.

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[51] A/CN.4/488/Add.2, comments by Italy under article 19.

[52] This is the view both of France (above, para. 52) and the Czech Republic (above, para. 53), despite their different emphases and conclusions.